



In the Matter of:

**COMMERCIAL LAUNDRY & DRY  
CLEANING, INC., et al.**

**ARB CASE NO. 96-136**

**(ALJ CASE NO. 94-SCA-46)**

**DATE: November 13, 1996**

BEFORE: THE ADMINISTRATIVE REVIEW BOARD<sup>1</sup>

### **FINAL DECISION AND ORDER**

This matter arises under the McNamara-O'Hara Service Contract Act of 1965, as amended (SCA), 41 U.S.C. § 351 *et seq.* and the regulations at 29 C.F.R. Part 8. The case is pending on the petition of Commercial Laundry and Dry Cleaning d/b/a New Way Laundry and Cleaning, William J. Manning and David Waldon (Petitioners), seeking review of the March 15, 1996 Decision and Order (D. and O.) of the Administrative Law Judge (ALJ). In the D. and O., the ALJ held that Petitioners violated Sections 2(a)(1) and 2(a)(2) of the SCA by failing to pay service employees engaged in the performance of SCA-covered contracts the minimum monetary wages and fringe benefits required by such contracts. Additionally, the ALJ held that given these violations and other evidence, Petitioners failed to demonstrate the existence of "unusual circumstances" within the meaning of the SCA and therefore recommended that Petitioners be debarred pursuant to section 5(a) for a period of three years. For the reasons stated below, the ALJ's decision is affirmed in part and modified in part.

### **DISCUSSION**

Pursuant to 29 C.F.R. § 6.18, the parties negotiated agreed-upon stipulations which are set forth by the ALJ in his D. and O. at pages 2-3. In short, Petitioners stipulated that they violated Sections 2(a)(1) and 2(a)(2) of the SCA. However, Petitioners contend that certain "unusual circumstances" in their case justify relief from the statutory sanction of debarment. D. and O at 3.

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<sup>1</sup> On April 17, 1996, a Secretary's Order was signed delegating jurisdiction to issue final agency decisions under this statute to the newly created Administrative Review Board. 61 Fed. Reg. 19978 (May 3, 1996). Secretary's Order 2-96 contains a comprehensive list of the statutes, executive order, and regulations under which the Administrative Review Board now issues final agency decisions. Final procedural revisions to the regulations implementing this reorganization were also promulgated on that date. 61 Fed. Reg. 19982.

The regulations establishing the criteria for demonstrating whether “unusual circumstances” exist are found at 29 C.F.R. § 4.188. A three-part test is employed to establish whether relief from debarment is appropriate. Part I of the test states:

[W]here the [Petitioners’] conduct in causing or permitting violations of the Service Contract Act provisions of the contract is willful, deliberate or of an aggravated nature *or where the violations are a result of culpable conduct such as culpable neglect to ascertain whether practices are in violation*, culpable disregard of whether they were in violation or not, or culpable failure to comply with recordkeeping requirements (such as falsification of records) relief from debarment cannot be in order. Furthermore, relief from debarment cannot be in order where a contractor has a history of similar violations, where a contractor has repeatedly violated the Act, or where previous violations were serious in nature.

29 C.F.R. § 4.188(b)(3)(i); emphasis supplied. The second part of the test lists as prerequisites for relief “a good compliance history, cooperation in the investigation, repayment of moneys due, and sufficient assurances of future compliance.” 29 C.F.R. § 4.188(b)(3)(ii). Part III lists additional factors which must be considered if the conditions of Parts I and II are met, such as whether the contractor has committed recordkeeping violations which impeded the investigation; whether liability was dependent upon resolution of a bona fide legal issue of doubtful certainty; the nature, extent, and seriousness of any past or present violations, including the impact of violations on unpaid employees; and whether the sums due were promptly paid. *Id.*; see *Florida Transportation Service, Inc., Federal Transportation Services, Inc., and John C. Gorman, Jr.*, Board of Service Contract Appeals<sup>2</sup> (BSCA) Case No. 92-03, Aug. 31, 1992; *Elaine’s Cleaning Service*, BSCA Case No. 92-07, Aug. 13, 1992; and *Crimson Enterprises, Inc., and Carl H. Weidner*, BSCA Case No. 92-08, Sept. 29, 1992.

The ALJ erred in concluding that Petitioners met Part I of the test. Given that no additional factual material had been filed, the ALJ should have relied on the stipulations and the original complaint. In those stipulations, Petitioners agreed that they had an expired collective bargaining agreement (CBA) and “relied upon the belief” that the CBA had priority over the SCA. Stipulation 8(e); D. and O. at 3. Such reliance is inexcusable and does not constitute “unusual circumstances” within the meaning of the SCA or the regulations. Under 29 C.F.R. § 4.188(b)(4), Petitioners had an affirmative obligation to ensure that their pay practices were in compliance with the SCA. Failure to do so constitutes culpable neglect. See, e.g., *Island Movers, Inc.*, BSCA Case No. 92-29, October 30, 1992 (Petitioners’ failure to pay employees the required wage and fringe benefit rates showed “a culpable neglect to ascertain whether practices are in violation or not”); *Florida Transportation Service, Inc., et al., supra* (Petitioners’ failure to seek advice from the Department of Labor about its own interpretation of the SCA was “a clear demonstration of culpable negligence to ascertain whether practices are in violation and

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<sup>2</sup> See n.1 *supra*; 29 C.F.R. Part 8 (1995).

culpable disregard of whether they were in violation or not”). The fact that in this case the CBA had expired and no CBA was in effect should place Petitioners on notice to check with the Department of Labor on whether they had a valid basis to rely on the “priority” of the expired CBA over the SCA requirements. *Compare, J & J Merrick’s Enterprises, Inc. and Johnny E. Merrick*, BSCA Case No. 94-09, October 27, 1994.<sup>3</sup>

In addition to our conclusion reversing the ALJ’s finding regarding Part I of the debarment analysis, we agree with the ALJ’s conclusion that Petitioners have failed to meet the requirements of Part II by their failure to cooperate or demonstrate compliance during the investigation or pay back wages and fringe benefits. D. and O. at 6. Petitioners proffered no evidence to contradict this conclusion. Accordingly, the D. and O. is affirmed in part and modified in part. The Petition for Review is denied and Petitioners’ names shall be forwarded to the Comptroller General for debarment in accordance with 29 C.F.R. § 6.21(a).

**SO ORDERED.**

**DAVID A. O’BRIEN**

Chair

**KARL J. SANDSTROM**

Member

**JOYCE D. MILLER**

Alternate Member

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<sup>3</sup> We believe that the ALJ’s reliance on *J & J Merrick’s Enterprises* to support the finding that Petitioners met Part I of the test is misplaced. In that case, the Petitioner’s failure to pay its employees prevailing wages was the result of improper record keeping, which, however, was mitigated by facts of record indicating that the contractor was relying on ambiguous advice from the Wage and Hour Division concerning proper record keeping requirements.